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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

B.G.,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS
COUNTY,

Respondent;

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Real Party in Interest.

F056348

(Super. Ct. No. 510347)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Nancy B. Williamsen, Commissioner.

Stephen L. Foley, for Petitioner.

No appearance for Respondent.

John P. Doering, County Counsel and Linda S. Macy, Deputy County Counsel, for Real Party in Interest.

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*Before Wiseman, A.P.J., Levy, J., and Kane, J.

Petitioner seeks an extraordinary writ (Cal. Rules of Court, rule 8.452) to vacate the orders of the juvenile court issued at a contested 12-month review hearing, terminating her reunification services and setting a Welfare and Institutions Code section 366.26 hearing¹ as to her son M.K. We will deny the petition.

STATEMENT OF THE CASE AND FACTS

Dependency proceedings were initiated in September 2007 after petitioner's then four-month-old nephew D. was admitted to the hospital with a subdural hematoma and retinal hemorrhages, suggestive of Shaken Baby Syndrome (SBS). At the time, D. was a dependent of the juvenile court and had been placed in petitioner's care. Petitioner was also caring for her two sons, then six-year-old M.K. and six-month-old J.M.

Petitioner claimed D. was injured when she fell on the driveway holding him in his car seat. The car seat landed on its side and D. did not appear to be injured until the following morning when petitioner found him unresponsive in his crib. Dr. Fields, an expert in child abuse and D.'s attending physician, concluded D. was a victim of SBS as a result of violent shaking. According to Dr. Fields, victims of SBS live to their mid teenage years to early adulthood. D. would be neurologically devastated his entire life.

Following a police investigation, petitioner was arrested for child abuse. M.K. and J.M. were taken into protective custody by the social services agency (agency) and placed with their respective paternal grandparents.

The juvenile court detained M.K. and J.M. pursuant to a dependency petition alleging D.'s non-accidental injury while in petitioner's care placed them at a substantial risk of serious physical harm. In March 2008, the juvenile court conducted a seven-day contested combined jurisdictional/dispositional hearing during which Dr. Fields testified

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

concerning SBS and how he made this diagnosis in D.'s case. While proceedings were ongoing, petitioner filed a motion to strike Dr. Fields's testimony as conclusory, which the court denied. Petitioner also requested a continuance to allow an out-of-state expert to testify on petitioner's behalf. The court granted the continuance provided the expert personally appear. The expert did not appear and the court denied a second request for a continuance.

At the conclusion of the combined hearing, the juvenile court found D. sustained non-accidental injuries caused by petitioner. The court adjudged M.K. and J.M. dependents of the court and ordered them removed from petitioner's custody. The court also ordered reunification services for petitioner as well as for the respective fathers. As J.M. had previously been placed in his father's custody, the court allowed him to remain there under agency supervision. The court also set the six-month review hearing for September 2008. Petitioner appealed from the juvenile court's dispositional orders (F055442).

One of the principle objectives of petitioner's case plan was that she admit D.'s injuries were not accidental and that she was responsible for them. To that end, she was required to demonstrate that she could protect M.K. and J.M. from physical abuse by completing a clinical assessment, individual counseling, and a parenting program. The purpose of the clinical assessment was to determine whether petitioner had any underlying mental health issues that contributed to D.'s injuries. Petitioner willingly completed the clinical assessment but clung to her account that D.'s injuries were accidental. The clinician conducting the assessment concluded petitioner was not suffering from any mental health problems and recommended no services beyond those ordered by the court.

By September 2008, petitioner had completed her court-ordered services but adamantly refused to admit that she injured D. In addition, she began to exhibit signs of

mental instability and drug use. In June 2008, she was involuntarily hospitalized for attempting suicide by a drug overdose. J.M.'s father, W.M., told petitioner's therapist petitioner's roommate kicked her out of her home. Petitioner's roommate told the social worker petitioner feigned her suicide attempt. She stated she kicked petitioner out of her home because petitioner was asking her neighbors for marijuana. Petitioner refused however to drug test or release medical information concerning her mental health status. Instead, she referred the social worker to her attorney, apparently the one representing her in her criminal case.

The hearing originally set for September 2008 was conducted in October as a contested and combined 6 and 12-month review hearing. The recommendation before the court as to M.K. was to terminate reunification services and set a section 366.26 hearing.

The social worker testified petitioner regularly visited her sons and was never physically or verbally abusive to them. However, petitioner stated she would never admit hurting D. despite knowing her refusal would foreclose reunification with her sons.

Following testimony, petitioner's attorney argued there was no evidence M.K. could be a victim of SBS given his age. Therefore, there was insufficient evidence it would be detrimental to return him to petitioner's custody. Further, her attorney argued she regularly participated in her court-ordered services.

The juvenile court disagreed. It found petitioner's inability to cope with life's daily stressors and her unwillingness to engage in therapy to understand why she harmed D. placed M.K. and J.M. at a substantial risk of harm if returned to her custody. The court also found petitioner had not demonstrated the capacity to complete her case plan objectives and safely parent her children. Consequently, the court terminated petitioner's reunification services as to her sons and set a section 366.26 hearing as to M.K. The

court ordered J.M.'s continued placement with his father and set a family maintenance review hearing as to him. This petition ensued.

DISCUSSION

A. Expert Testimony

Petitioner argues the juvenile court abused its discretion in denying her motions to strike Dr. Fields's testimony and to continue the jurisdictional phase of the contested hearing to allow the out-of-state expert to testify. The first issue was raised in the appeal currently pending before this court (F055442). Consequently, we need not address it. The second issue was not raised in the appeal and is therefore waived. (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811-812.)

B. Detriment

Petitioner challenges the sufficiency of the evidence supporting the juvenile court's detriment finding as to M.K. Specifically, she claims the juvenile court erroneously based its finding solely on her refusal to admit she shook D. Further, she defends her refusal to admit any wrongdoing on the grounds it could be used to convict her in the criminal case pending against her.

The juvenile court can refuse to return a child to parental custody if the child's return would create a substantial risk of detriment to the child's safety, protection or well-being. (§§ 366.21, subds.(e) & (f); 366.22, subd. (a).) In assessing the risk of detriment, the court considers the extent to which the parent participated and made progress in the court-ordered treatment plan. (*Ibid.*) Ultimately, the court's decision hinges on whether the parent's progress eliminated the conditions leading to the child's placement out of the home. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142.)

In this case, M.K. was removed from petitioner's care because she physically abused D. In order to eliminate the danger of abuse petitioner posed to M.K., she was required to admit she abused D. and to participate in therapy to treat her propensity for

abuse. However, she refused to do that. Instead, she focused her reunification efforts on completing every service except the most critical one. She now claims the court erred from the very beginning by making reunification contingent upon her admission to abusing D. However, she fails to explain why she did not raise that issue on appeal from the dispositional orders. Having not done so, she acquiesced to the court's requirement. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 47.) Further, she neglects to mention that use immunity is available to parents, such as her, who are proceeding simultaneously in criminal and juvenile courts for child abuse. (*In re Jessica B.* (1989) 207 Cal.App.3d 504, 521.) Consequently, any statements she made in therapy that constituted an admission to the acts charged in the criminal proceedings could have been barred from use in the criminal proceedings absent some action on her part placing them at issue. (*Ibid.*) Therefore, any claim the court's requirement infringed her right against self-incrimination is unfounded.

Turning to the court's finding of detrimental return, we conclude substantial evidence supports it given the severity of D.'s abuse and petitioner's adamant denial she inflicted it. Even assuming, as petitioner argues, her denial was insufficient to make the finding, there was other evidence M.K. would be at risk if returned to petitioner's custody. Petitioner's erratic behavior and refusal to drug test or authorize the release of her medical records suggest she was using drugs and/or was mentally unstable. Since her behavior was potentially harmful to M.K. and since she would not allow the agency to assess it, the court had no choice but to protect M.K. by maintaining him in the agency's custody. We concur with the juvenile court's detriment finding.

C. Termination of Reunification Services

Petitioner argues her inability to admit she abused D. was an extenuating circumstance. Consequently, she claims, the juvenile court should have excused her

noncompliance, found a substantial likelihood M.K. could be returned to her custody, and continued services.

As we discussed above, petitioner's unwillingness to admit her abuse is not excusable given the immunity available to her. Further, the juvenile court had no choice at the 12-month review hearing but to terminate petitioner's reunification services and set a section 366.26 hearing unless it found a substantial probability M.K. could be returned to her custody by the 18-month review hearing. (§ 366.21, subd. (g)(1).) In order to find a substantial probability of return, the court had to find petitioner made significant progress in addressing her abusive behavior and could safely parent M.K. (*Ibid.*) By her refusal to engage in therapy, petitioner foreclosed any possibility M.K. could be returned to her care. The only evidence before the court was that she committed a serious act of child abuse for which she took no responsibility and made no effort to prevent a reoccurrence. Consequently, we concur with the juvenile court there was not a substantial probability M.K. could be returned to petitioner's custody with continued services. We find no error on this record.

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final forthwith as to this court.